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MEMORANDUM OF LAW

DATE: August 19, 1999

TO: George Loveland, Deputy City Manager; Frank Belock, Director, Engineering and Capital Projects; Larry Gardner, Water Department Director; and David Schlesinger, Director, Metropolitan Wastewater

FROM: City Attorney

SUBJECT: Utility Relocation

QUESTION PRESENTED

When are cities required to bear the expense for relocating a utility's facilities that are in the City's right of way?

SHORT ANSWER

Whenever requested or required by the City for a project offering some benefit to the public, a utility must relocate, at no cost to the City, any of its facilities located within a public right of way pursuant to a state or municipal franchise.

DISCUSSION

I. General Rule

Under common law, codified in California Public Utility Code (CPUC) section 6297, when a public utility accepts franchise rights in public streets, it assumes an implied obligation to pay for relocation of its facilities when necessary to make way for a proper governmental use. This obligation arises from the paramount right of the people as a whole to use public rights of

way. *City of Livermore v. Pacific Gas & Electric Co.*, 51 Cal. App. 4th 1410, 1413 (1997). CPUC section 6297 provides:

> The grantee shall remove or relocate **without expense to the municipality** any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction of any subway or viaduct, by the municipality. [Emphasis added].

"A review of the cases interpreting section 6297 and the common law indicate an almost unanimous refusal to allow utility company franchisees to recover reimbursement for equipment relocation expenses." *Pacific Gas & Electric Co. v. City of San Jose*, 172 Cal. App. 3d 598, 601 (1985). The courts have concluded that until the legislature codifies an exception, the utility will only be relieved of the responsibility to relocate its facilities within a public thoroughfare at its expense if: (1) it has a property interest in the form of an easement, (2) a private party, rather than the municipality, requests or requires the relocation or (3) there is no expenditure of public funds. *Id.* at 603; *Livermore*, 51 Cal. App. 4th at 1416-1417. The courts have broadly interpreted what constitutes "public funds." Funds generated by the exercise of legislative authority to levy taxes for a project offering any public benefit are deemed public funds. This is true even if the project is partially funded with private monies and affords some private benefit. *Id.*

II. State and Local Franchises

Telephony services are provided under a state franchise pursuant to CPUC section 7901. Entities providing "information services" as defined in 47 U.S.C. § 153(20) [1996 Telecom Act] are not required to obtain local franchises, but local governments retain the right to manage the public rights of way on a nondiscriminatory basis. 47 U.S.C. § 253(c). All other utilities have local franchises. Utilities which have city franchises include cable system operators and energy utilities. All City franchises contain specific provisions which obligate the utilities to relocate their facilities at their sole expense when required by the City in exercising its police powers.

All utilities, other than those providing information services, are required to bear the cost of relocating their equipment as provided in CPUC section 6297. However, because San Diego Municipal Code section 62.1100, et seq., requires all utilities to pay for the removal or relocation of their facilities for a proper government purpose, a strong argument can be made that utilities providing information services are also responsible for such relocation costs.

III. Exceptions to Utility's Obligation to Bear Relocation Costs

A. LEGISLATIVE EXCEPTIONS

The only exceptions to the statutory obligation set forth in CPUC section 6297 are those established by the legislature. *Pacific Tel. & Tel. Co. v. Redevelopment Agency of the City of Redlands*, 75 Cal. App. 3d 957, 964 (1977). No such exceptions have been enacted to date.

"When the Legislature intends that a utility be reimbursed for its relocation costs, it has said so in specific and direct language." *Id*. at 966. In *Redlands*, the City of Redlands approved a redevelopment plan, which required relocation of the utility's facilities. The utility argued that the legislature intended for a utility to be compensated for relocating facilities pursuant to California Health and Safety Code sections 33390, 33391, and 33395. The court concluded that the purpose of such sections of the Health and Safety Code was "to protect franchise holders, including utilities, from uncompensated seizures of property occasioned by redevelopment projects" and that the legislature only intended to allow compensation for seizures, not "to go beyond constitutional demands" by allowing compensation for relocation. *Id.* at 965-966.

Similarly in *Pacific Tel. & Tel. Co. v. Redevelopment Agency of the City of Glendale*, 87 Cal. App. 3d 296, 300 (1978), the court rejected the utility's argument that relocation assistance under California Government Code section 7260 (relocation assistance law) was an exception to CPUC section 6297. The court explained that an intent to exempt utilities from the common law rule cannot be inferred merely from the broad definitions used in the relocation assistance law, but must be a specific provision in the Public Utilities Code. *Id.*

B. EASEMENTS

If an utility has an easement, rather than a franchise, it is not required to bear the expense of relocating its equipment. *Pacific Gas & Electric Co. v. County of San Mateo*, 233 Cal. App. 2d 268, 275 (1965). In *San Mateo*, the utility held an easement in the County of San Mateo. San Mateo acquired land subject to the utility's easement and made plans to widen the street, which required additional fill to be placed on the utility's easement necessitating relocation of a gas main. The court ruled that San Mateo's plan to place twelve feet of earth fill over the utility's gas main would interfere with its property interest, and awarded relocation costs as damages. *Id.*

Because an easement is a property right, the utility is not required to bear the cost of relocation, even for a municipal project. However, when a utility's equipment is in the right of

way pursuant to a franchise, this possessory right is conditioned upon an obligation to pay the costs of relocation.

C. RELOCATION REQUIRED BY PRIVATE PARTY, NOT THE CITY

"(W)here a private party, on its own initiative, and not that of government, develops a parcel of land and [as a consequence] creates . . . a need for a public improvement which requires the relocation of existing utility equipment," then the private party, not the utility, must bear the cost of the relocation. *Pacific Gas & Electric Company v. Damé Construction Co., Inc.*, 191 Cal. App. 3d 233, 242 (1987). However, the courts have rejected attempts by utilities to broaden the *Damé* public vs. private benefit theory into an exception to the utilities' obligation to pay when requested by a governmental agency. *San Jose,* 172 Cal. App. 3d at 602-603.

The *Damé* court explained that the developer and the residents of the subdivision were the primary beneficiaries of the road widening even though it was required by a governmental agency as a condition of approval of the redevelopment. However, as *Livermore* later explained, this "broadly stated conclusion that privately instigated development must bear the costs of utility relocation is limited by the premise from which the court began: the common law and statutory rules governing payment for utility relocation do not apply when a *private party* seeks to make a utility pay for relocation." *Livermore*, 512 Cal. App. 4th at 1415 (emphasis in original).

When relocation is requested by a governmental agency for a project utilizing municipal resources, the utility is obligated to pay for the relocation. This holds true even when the project confers private benefits and the funds were originally collected from a private developer. *Id.* at 1417.

Finally, it makes no difference if one governmental agency requests the relocation in another governmental agency's jurisdiction. The utility's obligation arises out of "the paramount right of the people as a whole to use the public streets wherever located." *Southern California Gas Co. v. City of Los Angeles*, 50 Cal. 2d 713, 717 (1958).

D. MUNICIPAL RESOURCES CANNOT BE EXPENDED FOR RELOCATION IN PUBLIC RIGHTS OF WAY

A review of recent decisions seems to indicate that any project having some public benefit will be considered publicly funded if it is financed by any funding mechanism relying on municipal legislative tax powers. *San Jose,* 172 Cal. App. 3d at 602; *Livermore,* 31 Cal. App. 4th at 1417.

Both the *San Jose* and *Livermore* cases involved projects funded partially by assessment districts. In *San Jose,* the court explained:

> The fact that assessment districts are created by the city or county as funding mechanisms for certain improvements does not justify an exemption to the clear cut public policy heretofore discussed. For example, it is conceivable that a county could divide its area into various assessment districts to pay for all public improvements and lower general property taxes.

San Jose, 172 Cal. App. 3d at 602.

Moreover, funds which were originally acquired from private developers as permit fees do not lose their characterization as municipal resources just because they were collected from a certain portion, rather than the entire, population. *Livermore,* 31 Cal. App. 4th at 1417.

The utility argued that the assessment districts should bear the relocation costs because the common law and CPUC section 6297 only prohibit utilities from seeking reimbursement from municipal funds but did not protect funds collected by the city as assessments on private property. *San Jose* at 601. The court rejected the utility's argument, concluding that because cities will contribute a portion of the funding, there is an "inescapable conclusion of some public benefit flowing" from the project. *Id.* at 603. The court went on to explain that because there is no authority allowing for partial reimbursement to the franchisee, when any public benefit results from the improvements causing the relocation of utility equipment, the utility must bear the total cost of relocation. *Id*.

In *Livermore,* the City formed an assessment district to fund a street-widening project. The City of Livermore agreed to pay some of the cost with funds generated by traffic impact fees [TIF]. TIF were paid by the recipients of building permits but were not taxes on the general population. The trial court ruled that TIF funds are analogous to general tax revenues because they are public funds, generated for governmental purpose by the exercise of the city's legislative authority to levy taxes. Such methods of raising funds for public improvements benefit the taxpayers by reducing their general tax burdens. *Livermore* at 1417.

IV. Proprietary Purpose vs. Governmental Purpose

Early on, in determining what was a "proper governmental purpose" the courts distinguished between a proprietary and a governmental purpose. However, this distinction

appears to have been abandoned, with the courts now looking to whether the project requiring the relocation utilizes public funds.

In *Postal Tel.-Cable Co. v. City and County of San Francisco*, 53 Cal. App. 188 (1921), the court analyzed the distinction between a proprietary purpose and a governmental purpose. In that case, the City and County of San Francisco maintained and operated a railway system, whose expansion required the utility to relocate its facilities. Although San Francisco conceded that the operation of its railway system was a proprietary purpose, it contended that "it was acting in a governmental capacity in determining that it would engage in the operation of the same and in the selection of the route or right of way over which it would operate the same. . . ." *Id.* at 190-191. Essentially, San Francisco argued that the decision-making was a government function, not a proprietary function.

The court rejected San Francisco's contention. The court ruled that the defendant's decision to extend a railway system, which was a proprietary purpose, was comparable to the decision-making of a private corporation involved in "a like enterprise." They further stated that the railway system was not for "the usual and ordinary purposes for which public streets and highways are created." They concluded that the entire enterprise involving the railway system was a proprietary enterprise, not a governmental function. *Id.* at 193.

However, in 1977, the *Redlands* court seemed to reject the distinction between a proprietary purpose and a governmental purpose. "A utility's right to compensation should depend, not on whether municipal activity is 'governmental' or 'proprietary,' but on whether compensation has been required by the Legislature . . . " *Redlands*, 75 Cal. App. 3d at 969. Although the court apparently rejects the test of whether the municipal activity is a governmental purpose or proprietary purpose, they nevertheless went on to discuss the distinction, explaining that the situation in *Postal Tel.-Cable* differed from present-day conditions when urban development, such as purchasing railway systems, has become a "legitimate governmental function." *Id.* at 970.

The court reasoned that:

> [R]edevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended. . . . Municipal acquisition of blighted areas

> for redevelopment under the Community Redevelopment Law has consistently been held to be a proper function of government.

Id. at 969-970.

A. REDEVELOPMENT PROJECTS

Utilities have unsuccessfully argued that they should be relieved of relocation expenses for redevelopment projects either because the redevelopment projects constitute a taking or are not a proper governmental purpose. Both arguments have been rejected.

In *Redlands*, the utility argued that under California Health and Safety Code sections 33390, 33391, and 33395, "compensation must be made in the same manner and to the same extent as if a constitutionally compensable taking or damaging of property had occurred." *Redlands*, 75 Cal. App. 3d at 965. The court concluded that these projects did not impose on the utility a burden it had not already assumed when it accepted the franchise by constructing its facilities in public streets, and therefore, did not constitute a taking which entitled the utility to compensation. *Id.* at 964.

In *East Bay Mun. Utility Dist. v. Richmond Redevelopment Agency*, 93 Cal. App. 3d 346 (1979), a utility argued that it should not be responsible for relocation costs related to a redevelopment project because it was an improper use of the police power to vacate streets. The utility district asserted that the vacation of the streets was for the benefit of private developers, rather than to make way for a proper governmental purpose. The court reasoned that the City's vacation of public streets to remove urban blight and substandard conditions is obviously a proper exercise of its police powers, since it is operating under well established law. *Id*. at 356.

B. SEWER AND WATER

Utilities have also unsuccessfully argued that laying sewer and water lines is a proprietary, rather than governmental function. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal. 2d 713 (1958). In this case, the utility argued that it was not required to pay the relocation costs because the sewer lines were a proprietary purpose. In rejecting this argument, the court held that laying of sewers is a governmental, not a proprietary function, because a public utility accepts franchise rights in public streets subject to such purposes. *Id.* at 716.

CONCLUSION

Unless the utility has an easement, any equipment located within a City right of way must be relocated at no cost to the City if there is a public benefit from the project requiring the relocation. This applies to all utilities and all projects having some public benefit, including a redevelopment project partially funded by and/or benefitting private developers.

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